

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
9 February 1994 \*

(Official – Rejection of an application for a post –  
Rejection of a request for promotion)

In Case T-82/91,

**Edward Patrick Latham**, a former official of the Commission of the European Communities, residing at Wezembeek-Oppem (Belgium), represented by Bernard O'Connor, Solicitor, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicant,

v

**Commission of the European Communities**, represented by Christopher Docksey, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremliis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for (i) the annulment of the Commission's decision to reject the applicant's candidature for the post of Head of Unit 3 of the Consumer Policy Service at Grade A 3, (ii) an order requiring the Commission to fill that post at Grade A 3 and to appoint the applicant to that post and (iii) an award of damages,

\* Language of the case: English.

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: C.P. Briët, President, A. Saggio and H. Kirschner, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on  
26 October 1993,

gives the following

**Judgment**

**Facts and procedure**

- 1 The applicant, Mr Latham, was recruited as a member of the temporary staff in 1971. In 1974, he was appointed an official and classified in Grade A 4.
- 2 The applicant was employed in the translation service until 1973 and then in Directorate-General III until 1983. From that time he was concerned with consumer protection, initially in the competent directorate of Directorate-General XI and then, from 1989 until his retirement on 30 November 1991, in the Consumer Policy Service (hereinafter 'CPS').
- 3 Following the publication on 7 September 1990 of vacancy notice No 25, the applicant, on 12 September 1990, submitted his application for the post of Head of Unit 3 in the CPS (post COM/116/90), which was to be filled at Grade A 5/A 4/A 3. The post was the subject of a new vacancy notice, No 27, dated 27 September 1990.

- 4 The standard form used by the applicant to submit his application for the Head of Unit 3, CPS, was headed 'Candidature pour une mutation/promotion' (Application for a transfer/promotion). The applicant crossed out the word 'mutation'.
- 5 By a note dated 13 December 1990, the Secretary of the Advisory Committee on Appointments ('the Advisory Committee') informed the applicant that during its meeting on 22 November 1990 the Advisory Committee had decided to recommend an appointment in Grade A 5/A 4 to the post in question and to take into consideration two candidatures, including the applicant's.
- 6 By decision of the appointing authority of 16 January 1991, the other short-listed candidate, Mr H., a principal administrator in Grade A 4, was transferred to the post of Head of Unit 3, CPS.
- 7 On 16 April 1991, the applicant lodged a complaint under Article 90 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') in which he contended that he ought to have been appointed to the post concerned and that this post ought to have been filled at Grade A 3. The complaint was lodged at the General Secretariat of the Commission under No R/84/91.
- 8 By letter of 10 September 1991, the Commission notified the applicant of its decision of 24 July 1991 not to act upon his complaint.
- 9 Those were the circumstances in which, by application lodged at the Court Registry on 15 November 1991, the applicant brought this action.
- 10 By separate document lodged at the Court Registry on 22 January 1992 the Commission raised an objection of inadmissibility. The applicant lodged

observations on the objection of inadmissibility on 21 February 1992. By order of 10 July 1992, the Court decided to reserve its decision on the objection until final judgment.

- 11 Upon hearing the report of the Judge-Rapporteur the Court decided to open the oral procedure without any preparatory inquiry.
- 12 After hearing the parties, the President of the Fourth Chamber decided to join the case, for the purposes of the oral procedure, to Case T-3/92 *Latham v Commission* in which the applicant seeks the annulment of the Commission's decision of 25 April 1992 to appoint the applicant to the post of Adviser to the Director-General of the CPS in so far as it maintained his classification in Grade A 4.
- 13 The parties presented oral argument at the hearing on 26 October 1993.

#### **Forms of order sought by the parties**

- 14 The applicant claims that the Court should:
  - (i) annul the Commission's decisions to reject his candidature for the position of Head of Unit 3, CPS, at Grade A 3;
  - (ii) annul the Commission's decision to reject his complaint No R/84/91 concerning his application for appointment to the position of Head of Unit 3, CPS, at Grade A 3;
  - (iii) order the Commission to appoint the applicant to the position of Head of Unit 3, CPS;

- (iv) declare that the appointment to the post of Head of Unit 3, CPS, be at Grade A 3;
  - (v) declare that damages be granted to him for the Commission's failure to give him an effective opportunity to be appointed to the position of Head of Unit 3, CPS, at Grade A 3, equivalent to the loss of income and loss of pension benefits following the Commission's failure to appoint him at Grade A 3, together with interest;
  - (vi) in the alternative, and owing to his impending retirement on 30 November 1991 and the subsequent loss of opportunity to reapply for the post of Head of Unit 3, CPS, at Grade A 3, award damages for loss of A 3 pension benefits together with interest;
  - (vii) order the defendant to pay the costs.
- 15 The Commission contends that the Court should:
- (i) declare the application inadmissible in its entirety;
  - (ii) dismiss the application as unfounded;
  - (iii) make an appropriate order as to the costs of the proceedings.

### Admissibility

*The claim for the annulment of the Commission's decision to reject the applicant's candidature for the post of Head of Unit 3, CPS, at Grade A 3, and of the Commission's decision of 24 July 1991 rejecting the applicant's complaint*

### Arguments of the parties

- 16 The Commission points out that the applicant has retired and is no longer a member of the Commission's staff and maintains that he no longer has any personal interest in the annulment of another candidate's appointment to the post of Head of Unit 3, CPS, and that, consequently, his claims for annulment must be declared inadmissible.
- 17 The applicant states that he is seeking the annulment of the Commission's decision to reject his candidature for the post of Head of Unit 3, CPS, at Grade A 3, and that the objection of inadmissibility does not concern this claim. The claim for the annulment of the Commission's decision to appoint Mr H. is ancillary. He considers that he continues to have a personal interest in the procedure for the appointment of a candidate to the post of Head of Unit 3, CPS, to the extent that he has suffered material loss as a result of the Commission's conduct. He also points out that the objection of inadmissibility likewise does not concern his claim for the annulment of the Commission's decision to reject his complaint R/84/91 concerning his candidature for the post of Head of Unit 3, CPS and his promotion to Grade A 3.

### Assessment of the Court

- 18 First of all, the subject-matter of the action must be determined.
- 19 The standard form used by the applicant to submit his candidature for the post of Head of Unit 3 was headed 'Candidature pour une mutation/promotion'. Since he had crossed out the word 'mutation', the applicant was applying for the post solely in order to obtain promotion.
- 20 In the part of the application setting out the form of order sought, the applicant seeks the annulment of 'the Commission's decisions' to reject his candidature for the position of Head of Unit 3, CPS, at Grade A 3 and the annulment of the

Commission's decision to reject complaint R/84/91. In the schedule of annexes the applicant states that the note dated 13 December 1990 from the secretary of the Advisory Committee, informing the applicant of the decision to fix the grade of the post concerned at A 5/A 4, is one of the measures to be annulled, as well as the letter from Mr De Koster dated 10 September 1991 informing the applicant of the rejection of his complaint R/84/91.

- 21 In these circumstances, the action must be regarded as seeking the annulment of, first, the Commission's decision to reject the applicant's request for promotion – that request having been made by him when he applied for the post of Head of Unit 3, CPS – and, secondly, the Commission's decision of 24 July 1991 not to act upon his complaint. The Court considers that the first decision was incorporated in the appointing authority's decision of 16 January 1991, transferring Mr H., an official in Grade A 4, to the post of Head of Unit 3, CPS, and that that decision was confirmed by the express decision rejecting the applicant's complaint on 24 July 1991.
- 22 The decision of 16 January 1991 appointing Mr H. to the post for which the applicant had also submitted his candidature directly affected the applicant's legal situation owing to the fact that in adopting that decision the Commission rejected the applicant's request for promotion. In so far as the application seeks the annulment of the appointing authority's decision of 16 January 1991, confirmed by the express decision rejecting his complaint, the action was therefore brought against an act adversely affecting the applicant, within the meaning of Article 90(2) of the Staff Regulations.
- 23 The next matter to be examined is the applicant's interest in seeking the annulment of the decision of 16 January 1991, bearing in mind that the applicant retired on 30 November 1991.
- 24 The Court considers that the applicant, who is now retired, cannot reasonably claim to be appointed to the post of Head of Unit 3, CPS, because he no longer belongs

to the institution within which the post filled by the contested decision was vacant. It follows that the applicant no longer has any legitimate interest in the annulment of the appointment of Mr H. to that post.

25 The Court considers, however, that the application for annulment is admissible in so far as it concerns the Commission's decision, confirmed by the express rejection of the complaint, not to promote the applicant to Grade A 3. Although now retired, the applicant still has an interest in having the decision not to promote him declared unlawful in order to obtain compensation for the damage which that decision may have caused him (see, in particular, the judgment of the Court of First Instance in Case T-82/89 *Marcato v Commission* [1990] ECR II-735, paragraph 54 at p. 752).

26 It follows from the foregoing that the application for the annulment of the Commission's decision of 16 January 1991, confirmed by the express decision of 24 July 1991 rejecting the applicant's complaint, is admissible in so far as it seeks the annulment of the decision to reject the applicant's request for promotion.

*The claim for an order requiring the Commission to appoint the applicant to the post in question*

#### Arguments of the parties

27 As regards the applicant's claim for an order requiring the Commission to appoint him to the post of Head of Unit 3, CPS, at Grade A 3, the Commission contends that it is clear from settled case-law (judgments of the Court of Justice in Case 62/65 *Serio v Commission of the EAEC* [1966] ECR 561, Joined Cases 63/70 to 75/70 *Bode and Others v Commission* [1971] ECR 549, at p. 554, Case 224/87 *Koutchoumoff v Commission* [1989] ECR 99, at p. 120, Case C-100/88 *Oyowe and Traore v Commission* [1989] ECR 4285, at p. 4309 and Case C-137/88 *Schneemann and Others v Commission* [1990] ECR I-369, at p. 392) that 'the Court has no jurisdiction to issue injunctions to the administration when carrying out the review of legality entrusted to it by Article 91 of the Staff Regulations'.



- 28 The applicant, who accepts that this Court has no jurisdiction to issue injunctions to the administration when carrying out a review of legality based on Article 91 of the Staff Regulations, considers, however, that he still has an interest in being appointed to the post of Head of Unit 3, in a promotion to Grade A 3. He explains that his claim for appointment is intimately linked to his claim for promotion and that he is claiming appointment in order to be able to raise the question of his promotion.

#### Assessment of the Court

- 29 It is settled law that the Community judicature has no jurisdiction to issue injunctions to the administration when carrying out the review of legality entrusted to it by Article 91 of the Staff Regulations and that the obligations incumbent on the administration can derive only from the annulment, under Article 176 of the EC Treaty, of a measure adopted by it (see, in particular, paragraph 19 of the judgment in *Oyowe and Traore v Commission*, cited above, and paragraph 16 of the judgment in *Schneemann and Others v Commission*, cited above, and the judgment of the Court of First Instance in Case T-20/92 *Moat v Commission*, not yet published in the ECR, paragraph 36).
- 30 It follows that the claim for an order requiring the Commission to appoint the applicant to the post of Head of Unit 3, CPS, at Grade A 3, must be dismissed as inadmissible.

#### *The claim for damages*

#### Arguments of the parties

- 31 As regards the applicant's claim for compensation for the loss of income which he considers he has suffered as a result of not being appointed Head of Unit 3, CPS, at Grade A 3, the Commission considers that the applicant does not have a legitimate interest in this regard since he could have been appointed only to an A 4 post. The Commission states that it has a wide discretion as regards the grade at

which it may fill a post, that the post in question was classified as a Grade A 5/A 4 post and that the candidate appointed, Mr H., was appointed at Grade A 4.

- 32 As regards the applicant's claim for damages for an alleged loss of pension benefits, the Commission considers that the applicant, who retired on 30 November 1991, could not have suffered the slightest loss since, by virtue of Article 77 of the Staff Regulations and Annex VIII thereto, he could not have fulfilled the conditions necessary to receive a pension calculated on the basis of a salary corresponding to Grade A 3, even if he had been appointed to the post concerned, at Grade A 3, on 16 January 1991.
- 33 In his application, the applicant seeks damages on the ground that the Commission did not give him a real opportunity to be appointed to the post of Head of Unit 3, CPS, at Grade A 3. In the alternative, he claims damages for loss of pension benefits corresponding to Grade A 3. In his observations on the objection of inadmissibility, the applicant explains that he is seeking damages because the Commission did not give him a real opportunity to be promoted to Grade A 3 following a complete and impartial appraisal. He claims that one method of assessing damages to compensate him for the lack of promotion is to take a sum equivalent to the loss of income and pension rights to which an official in Grade A 3 is entitled in the normal course of events: it is not therefore a claim for pension rights at Grade A 3. In his observations on the objection of inadmissibility, the applicant further states that his key claim is for damages for failure of the Commission to act properly within its own procedures and that the Commission's failure to promote and appoint him gives rise to damages.

#### Assessment of the Court

- 34 It is apparent from the case-law of the Court of Justice, as examined and elaborated by the Court of First Instance (see its judgments in Case T-27/90 *Latham v Commission* [1991] ECR II-35, at paragraph 38, and in Case T-5/90 *Marcato v Commission* [1991] ECR II-731, paragraph 49 at p. 746 and its order in Case T-53/92 *Piette de Stachelski v Commission* [1993] ECR II-35, paragraph 17 at p. 41), that it is only where a direct link exists between an action for annulment and

an action for damages that the latter action is admissible as being ancillary to the action for annulment without its necessarily having to be preceded by a request made to the appointing authority for compensation for the damage allegedly suffered and by a complaint challenging the correctness of the implied or express rejection of the request. It must also be recalled that where a close link exists between a claim for annulment and an action for damages, the inadmissibility of the claim for annulment entails the inadmissibility of the claim for damages (judgments of the Court of Justice in Case 4/67 *Muller (née Collignon) v Commission* [1967] ECR 365, at p. 373, in Case 346/87 *Bossi v Commission* [1989] ECR 303, paragraph 31 at p. 334, and judgment in *Moat v Commission*, cited above, paragraph 46).

- 35 It must also be borne in mind that in the present case the claim for the annulment of the Commission's decision of 16 January 1991, as confirmed by the decision of 24 July 1991 rejecting the applicant's complaint, is admissible only in so far as it seeks the annulment of the decision not to promote the applicant to Grade A 3.
- 36 The Court considers that it is apparent from the application and from the explanations given by the applicant in his observations on the objection of inadmissibility that the claim for damages submitted by him is for compensation for the damage allegedly caused by the fact that the Commission did not promote him to Grade A 3. Consequently, the claim for damages is closely linked to the claim for the annulment of the Commission's decision not to promote him to Grade A 3. Since the claim for annulment is admissible, the claim for damages must also be considered to be admissible.

### Substance

*The claim for the annulment of the decision of 16 January 1991, confirmed by the decision of 24 July 1991*

Arguments of the parties

- 37 The applicant considers that the decision of 16 January 1991 not to promote him is unlawful.
- 38 The applicant's first plea is that the Commission made arbitrary and incorrect use of its discretion when fixing the level of the post to be filled at Grade A 5/A 4 and in appointing Mr H. to the post concerned. He contends in this regard that the Commission failed to rectify, within the period laid down by Article 43 of the Staff Regulations, his staff report for the period 1981 to 1983 following the judgments of the Court of First Instance in Case T-27/90 *Latham v Commission*, cited above, and Case T-63/89 *Latham v Commission* [1991] ECR II-19. Since the decision relating to the grading of the post and the decision relating to the short-listing of two candidates were taken at the same meeting, the applicant considers that it cannot be reasonably argued that his staff report and that of Mr H. did not influence those decisions. Thus, the Commission's decision on the question whether or not the applicant deserved to be appointed to the post concerned and deserved to be promoted was influenced by an unrectified staff report. He also claims that the Director-General based his decision on that incorrect and incomplete staff report when he made a recommendation to the Advisory Committee to the effect that Mr H.'s candidature for the post in question should be accepted. He also claims that the decision to set the level of the post at Grade A 5/A 4 is arbitrary in view of the fact that the post was previously classified in Grade A 3 and that the demands of the post had become greater and more complex. The decision not to appoint him as Head of Unit 3, CPS, at Grade A 3, was a wrong decision since he was more qualified and had more experience than the previous occupant of the post at the time of his appointment.
- 39 The second plea is that the Commission acted in breach of Article 6 of the EC Treaty (formerly Article 7 of the EEC Treaty) in so far as the decision not to promote the applicant was taken out of consideration of his British nationality.
- 40 The third plea on which the applicant appears to rely is that the Commission infringed the principle of the protection of legitimate expectations. He claims in this

regard that he received assurances giving him good reason to believe that he would reach Grade A 3 by the end of his career.

- 41 As regards the first plea, the Commission points out that in recruiting, promoting and assigning staff, the institutions of the European Communities must be guided primarily by the interests of the service and that they have a wide discretion to adopt specific decisions. As regards the filling of posts of head of unit at Grades A 5/A 4/A 3, that discretion is exercised within the framework of the procedure laid down in the Commission's decision of 19 July 1988 (COM(88)PV 928) concerning the filling of middle-management posts, published in *Administrative Notices* No 578 of 5 December 1988, which, according to the Commission, is intended to separate the question of the grade at which a post is fixed from the question of the duties performed by the person appointed to the post. The Commission contends that the applicant has not produced any evidence showing that it exercised its power in a arbitrary or manifestly erroneous manner in setting the level of the post at Grade A 5/A 4. In this regard, it points out that the grade at which a post is to be filled depends solely on the duties corresponding to the post concerned. As regards the contention that the applicant's staff report for the period 1981 to 1983 was not ready at the time when the decision not to promote him was taken, the Commission points out that the Advisory Committee had more recent information, such as the staff reports drawn up since 1983, which were all complete, so that the staff report for the period 1981 to 1983 could not have influenced the Commission's decision. The Commission further points out that the applicant's staff reports drawn up since 1983, which have not been contested by him, show that he lacks circumspection in his dealings with colleagues and it states that when one of two comparably qualified candidates must be chosen it is not unreasonable to appoint the candidate whose personality is more suited to management.
- 42 As regards the second plea, the Commission considers that the applicant has not adduced any specific evidence showing that his nationality influenced its decision.

- 43 Finally, the Commission states that any hope which the applicant may have entertained of ending his career in Grade A 3 is irrelevant for the purposes of the examination of the lawfulness of the decision to ascertain who was to be appointed to the post in question.

#### Assessment of the Court

- 44 It must be borne in mind first of all that this action has been understood as seeking the annulment of the decision of 16 January 1991 – confirmed by the decision of 24 July 1991 – in so far as it rejected the applicant's request to be promoted to Grade A 3.
- 45 The Court must therefore examine the legality of the Commission's decision to set the level of the post of Head of Unit 3 of the CPS at Grade A 5/A 4. If the decision setting the level of the post at grade A 5/A 4 proves to be lawful, it would follow that the decision not to promote the applicant – who had applied for promotion when submitting his application for the post concerned – is also lawful.
- 46 It follows from Article 5(1) and (4) of the Staff Regulations and from the general principles governing the public service that, although the Commission has a wide discretion in organizing its departments and assessing posts, it is the importance of the duties and responsibilities assigned to a particular post which must be the principal criterion by virtue of which it is appropriate to determine the level of a post which is to be filled (see, in particular, the judgment of the Court of Justice in Case 2/80 *Dautzenberg v Court of Justice* [1980] ECR 3107, paragraph 9 at p. 3117). It follows from that principle that the appointing authority must set the level of a vacant post of head of unit on the basis of the importance of the post, irrespective of the qualifications of any candidate or candidates who have applied for it following publication of the vacancy notice.
- 47 Since the appointing authority has a wide discretion in determining the level of a post to be filled, the Court's review must be limited in the present case to

examination of the question whether, having regard to the considerations which may have influenced the administration in making its assessment, the administration remained within reasonable bounds and did not use its power in a manifestly incorrect way. The Court cannot therefore substitute its assessment of the level at which the post is to be filled for that of the appointing authority (see, in particular, the judgment of the Court of Justice in Case 233/85 *Bonino v Commission* [1987] ECR 739, paragraph 5 at p. 757 and its judgment in Case 324/85 *Bouteiller v Commission* [1987] ECR 529, paragraph 6 at p. 546).

- 48 The applicant contends, however, that, since the decision relating to the level of the post and the decision relating to the short-listing of two candidates were taken at one and the same meeting, it cannot reasonably be argued that the staff reports of the two candidates chosen had no influence on the decision relating to the level at which the post was to be filled.
- 49 It should be recalled that in its judgment in Case T-63/89 *Latham v Commission*, cited above, the Court annulled the Commission's decision by which the applicant's staff report for the period 1981 to 1983 had been declared definitive on the ground that his superiors during that period had not been consulted.
- 50 The Court considers, however, that the applicant has not adduced any specific evidence to show that the appointing authority's decision regarding the grade at which the post in question was to be filled was influenced in general by the staff reports of the two candidates selected or, more particularly, by the applicant's unrectified staff report for the period 1981 to 1983.
- 51 As regards the level of the post, the applicant argues that it ought to have been set at level A 3 since it had previously been classified in that grade and the requirements of the post had become even more complex and more demanding.

52 It should be pointed out that, as regards the filling of posts of head of unit, the Commission's decision of 19 July 1988, mentioned above, clearly provides that a post of head of unit is to be either at level A 5/A 4 or at level A 3. Moreover, neither the Staff Regulations nor the Commission's decision of 19 July 1988 prevent the appointing authority from reassessing the level of a post of head of unit which has become vacant. In the case of such a decision, the Court's review is again confined to the question whether the appointing authority remained within the bounds of its wide discretion and did not use it in a manifestly incorrect way.

53 The Court observes that the applicant confines himself to making a personal and general assessment in relation to the importance of the duties corresponding to the post of Head of Unit 3 of the CPS in claiming that the appointing authority ought to have set the level of the post at Grade A 3. Even if it were proved that this post was classified in Grade A 3 before the appointment of Mr H., the Court considers that the applicant has not adduced any specific evidence to show that the appointing authority exceeded the limits of its discretion or used it in a manifestly incorrect way when setting the level of the post to be filled at Grade A 5/A 4 in its decision of 16 January 1991.

54 It follows from the foregoing that the plea alleging that the Commission used its discretion in an arbitrary and incorrect way when setting the level of the post to be filled at Grade A 5/A 4 must be dismissed.

55 As regards the second plea alleging infringement of Article 6 of the EC Treaty, the Court finds that there is no evidence to support it. Moreover, the applicant has not adduced any specific evidence showing that the nationality of the candidates influenced the decision taken by the appointing authority as regards the level of the post to be filled.

56 Consequently, the plea alleging infringement of Article 6 of the EC Treaty must be dismissed.



- 57 Finally, the applicant appears to be submitting a plea alleging the infringement of the principle of legitimate expectation in so far as he claims that his superiors always led him to believe that he would reach Grade A 3 at the end of his career.
- 58 It is settled law that the right to claim protection of legitimate expectations extends to any individual who is in a situation in which it appears that the Community administration has led him to entertain reasonable expectations. However, an official may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (judgment of the Court of Justice in Case 289/81 *Mavridis v Parliament* [1983] ECR 1731, paragraph 21 at p. 1744; judgment of this Court in Case T-123/89 *Chomel v Commission* [1990] ECR II-131, paragraphs 25 and 26 at p. 139).
- 59 In the papers before it the Court finds no evidence of precise assurances given by the appointing authority about the applicant's possible promotion to Grade A 3. In those circumstances, there can be no question of a breach of the principle of the protection of legitimate expectations and the plea based upon it cannot be upheld.
- 60 It follows from those considerations that the Commission's decision of 16 January 1991 is lawful in so far as it sets the level of the post of Head of Unit 3 of the CPS at Grade A 5/A 4. Consequently, the decision of 16 January 1991 – confirmed by the decision of 24 July 1991 – not to promote the applicant, who had sought promotion when submitting his candidature for the post of Head of Unit 3 of the CPS, is also lawful.
- 61 Nevertheless, the Court considers it appropriate to examine the question whether the decision of 16 January 1991 rejecting the applicant's candidature would have been lawful if the applicant had also sought a transfer.

- 62 With regard to this point, it must be recalled that, where there are applications for a transfer, the appointing authority must undertake a comparative examination of the merits of the officials concerned, as provided for in Article 45 of the Staff Regulations in the case of promotions (judgments of the Court of First Instance in Case T-52/90 *Volger v Parliament* [1992] ECR II-121, paragraph 24 at p. 132 and in Case T-25/92 *Vela Palacios v Economic and Social Committee* [1993] ECR II-201, paragraph 49 at p. 218). Under Article 7 of the Staff Regulations, after such an examination has been carried out, the appointing authority's choice of the official to be assigned to a post must be made solely in the interests of the service. In making such a decision, the appointing authority has a wide discretion in assessing the interests of the service and the suitability of the candidates for the post in question. According to settled case-law (judgment in *Bouteiller v Commission*, paragraph 6, and judgment in *Bonino v Commission*, paragraph 5), the Community judicature's review must be limited in such a matter to consideration of the question whether, having regard to the considerations which may have influenced the administration in making its assessment, the administration remained within reasonable bounds and did not use its power in a manifestly incorrect way. This Court cannot therefore substitute its assessment of the candidates' suitability or of the interests of the service for that of the appointing authority.
- 63 The applicant claims in substance that he would have been appointed to the post concerned if the appointing authority had had before it his rectified staff report for the period 1981 to 1983 at the time when it took the contested decision.
- 64 The Court points out in this regard that the fact that the personal file of one applicant is irregular owing to the absence of a staff report is not a sufficient ground for the annulment of an appointment unless it is established that this was capable of having a decisive effect on the appointment procedure (judgments of the Court of Justice in Case 263/81 *List v Commission* [1983] ECR 103, paragraph 27 at p. 117 and in Case 7/86 *Vincent v Parliament* [1987] ECR 2473, paragraph 17 at p. 2492).

- 65 The Court observes that the applicant's staff reports drawn up since 1983, namely the reports for the periods 1983 to 1985, 1985 to 1987 and 1987 to 1989, have not been contested by the applicant.
- 66 Given that the appointing authority had at its disposal the applicant's most recent staff reports at the time when it appointed Mr H. to the post concerned and bearing in mind that the applicant has not adduced any specific evidence to show that his unrectified staff report for the period 1981 to 1983 had a decisive influence on the appointment procedure, the Court considers that the opinions expressed in the staff report for the period 1981 to 1983 had no effect, or only a negligible effect, on the decision not to appoint the applicant to the post concerned.
- 67 The Court further considers that the applicant has not produced any evidence supporting the conclusion that the appointing authority exceeded the bounds of its discretion or used it in a manifestly incorrect manner in appointing Mr H. to the post of Head of Unit 3 of the CPS.
- 68 It follows from those considerations that the Commission's decision of 16 January 1991 to reject the applicant's candidature, after setting the level of the post of Head of Unit 3 of the CPS at Grade A 5/A 4, would be lawful even if the applicant had asked for a transfer when submitting his candidature for the post concerned.
- 69 Consequently, the claim for the annulment of the decision of 16 January 1991, confirmed by the decision of 24 July 1991, must be dismissed in its entirety.

### *The claim for damages*

#### Arguments of the parties

- 70 The applicant claims that he should be awarded damages on the ground that the Commission failed to give him an effective opportunity to be appointed to the

position of Head of Unit 3 of the CPS at Grade A 3. He considers that the measure of damages should be equivalent to the loss of income and loss of pension benefits resulting from the Commission's failure to appoint him to Grade A 3.

- 71 The Commission contends in substance that the applicant has not demonstrated any wrongful act on its part and that he is not therefore entitled to damages for the loss which he claims to have suffered.

#### Assessment of the Court

- 72 It is settled law that the Community can only be held liable to pay damages if a number of conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered (judgment of the Court of Justice in Case 111/86 *Delauche v Commission* [1987] ECR 5345, paragraph 30 at p. 5364; judgment of the Court of First Instance in Case T-165/89 *Plug v Commission* [1992] ECR II-367, paragraph 115 at p. 412).
- 73 The Court finds that the applicant is seeking compensation for the damage allegedly caused to him by the rejection of his candidature for the post in question and of his request for promotion.
- 74 The Court finds that the applicant has not provided any evidence of irregularities or unlawful acts committed by the Commission in setting the level of the post of Head of Unit 3 of the CPS at Grade A 5/A 4.
- 75 Since it is not established that the Commission acted unlawfully in setting the level of the post to be filled at Grade A 5/A 4, the claim for damages for the loss allegedly suffered by the applicant owing to his not being promoted from Grade A 4 to Grade A 3 must be dismissed.

76 It follows from the foregoing that the action must be dismissed in its entirety.

### Costs

77 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. However, under Article 88 of those Rules, the institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Briët

Kirschner

Saggio

Delivered in open court in Luxembourg on 9 February 1994.

H. Jung  
Registrar

C.P. Briët  
President